

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

GEOFFREY NELS FIEGER

Plaintiff,

CIVIL ACTION NO. 08-CV-14125

vs.

HON. DAVID M. LAWSON

FEDERAL ELECTION COMMISSION,

Defendant.

**PLAINTIFF'S SECOND SUPPLEMENTAL BRIEF AND EXHIBIT IN SUPPORT OF
MOTION FOR LEAVE TO CONDUCT DISCOVERY**

By and through counsel, and in order to fully apprise the Court of the matters currently pending, Plaintiff respectfully submits his second supplemental brief and exhibit in support of his motion for leave to conduct discovery (Docket No. 16). In support of his supplemental response, Plaintiff states the following:

1. In his motion for leave to conduct discovery, Plaintiff Fieger asks that the Court allow him the opportunity to conduct discovery in this FOIA case based on Defendant Commission's failure to provide responsive documents requested under Plaintiff's FOIA request dated July 3, 2008.

2. Recently, the undersigned counsel obtained documentary proof that the Commission had in its possession e-mails sent from former Commission Chairman Michael Toner to White House Deputy Sara Taylor (who reported directly to Karl Rove) and Republican National Committee General Counsel Thomas Josefiak. On March 17, 2009, Plaintiff filed with this Court his Supplemental Brief and Exhibit in Support of Motion for Leave to Conduct Discovery (Docket No. 29).

3. On March 24, 2009, the undersigned counsel sent Defense counsel a letter requesting that Defendant Commission comply immediately with Plaintiff's FOIA request dated July 3, 2008, and produce, among others, the Toner e-mail sent to the White House and RNC. (**Supplemental Exhibit A**, Letter to defense counsel dated March 24, 2009).

4. On April 1, 2009, the Commission produced to the undersigned counsel, for the first time, the Toner e-mail in question (**Docket No. 30-2** attached to Defendant's Opposition to Plaintiff's Supplemental Brief).

5. On April 2, 2008, Defendant Commission filed its opposition to Plaintiff's supplemental brief asserting that the Toner e-mail produced was not responsive to Plaintiff's FOIA request dated July 3, 2008 and thus it was under no obligation to produce it. Instead, the Commission claims that the Toner e-mail was responsive to Plaintiff's FOIA request dated October 27, 2008, and it has now been produced, conveniently, in good faith.

6. Contrary to Defendant Commission's explanation, even a cursory review of the Toner e-mail reveals that it falls squarely within Plaintiff's FOIA request dated July 3, 2008 (it also falls within Plaintiff's FOIA request of October 27, 2008, but that does not negate the fact that it is, in fact, responsive to the earlier FOIA request dated July 3, 2008).

7. The e-mail in question contains legislative proposals by the Justice Department "designed to eliminate statutory loopholes, make the sentencing for FECA offenses more uniform, and improve the effectiveness of the Justice Department's *criminal law enforcement* responsibilities under the campaign financing laws." (Toner e-mail to White House and RNC containing letter from Assistant Attorney General William Moschella to the Honorable Dennis Hastert)(emphasis added). Plaintiff's FOIA request dated July 3, 2008, sought documents between the Commission and the White House

“relating in any way to enforcement of federal criminal statutes, including, but not limited to, the Federal Election Campaign Act.” Based on the language of Plaintiff’s July 3 FOIA request, and the contents of the Toner e-mail to the White House and RNC, it is disingenuous for the Commission to claim, in good faith, that the Toner e-mail fell outside the scope of the July 3 FOIA request.

8. As the Toner e-mail shows, Mr. Toner wanted Mr. Rove’s and the RNC’s commentary on “criminal law enforcement responsibilities under the campaign financing laws.” So why does Mr. Toner, the Chairman of the Federal Election Commission, need the input of Karl Rove and the Republican National Convention as to “criminal law enforcement responsibilities under the campaign financing laws[?]”

9. As Plaintiff highlights in his initial motion for leave to conduct discovery, there is evidence that the Justice Department and the Federal Election Commission have engaged in selective prosecutions based on partisan politics. The recently produced Toner e-mail corroborates an article that appeared recently in the American Trial Lawyer Magazine:

Rove’s plan was to center his project inside the Justice Department – which was being aggressively converted into a partisan tool through a series of recruitment and management tools that Rove improvised. It was essential to the scheme that the FEC bow out and turn control over election law finance investigations in these cases to political hacks operating inside the Justice Department.

About this time, Rove and his staffers held a number of secretive discussions with Federal Election Commission chair Michael Toner, and the FEC entered into some highly suspicious agreements to turn over enforcement authority in matters involving Democratically-oriented trial lawyers to the Justice Department. The FEC has tenaciously resisted disclosures about its dealings and has withheld from discovery a number of explosive emails between the White House and Toner which relate to the project, while the White House copies appear to belong to the more than two million emails that mysteriously “disappeared” when federal prosecutor Patrick

Fitzgerald began his investigation of Rove's involvement in the outing of cover CIA agent Valery Plame.

Scott Horton, Fieger's Fight for Freedom, *The American Trial Lawyer*, pg. 60 (Attached to Plaintiff's Motion for Leave to Conduct Discovery as Exhibit G).

10. In order to maintain the secrecy of their communications, Mr. Toner sent the e-mail in question to Ms. Taylor's "gwb43" e-mail account instead of an authorized government e-mail account.

11. These facts demonstrate, at a minimum, that Defendant Commission has not been forthcoming in its handling of Plaintiff's FOIA request, possibly because of the embarrassing and/or improper communications at issue.

12. As the Sixth Circuit aptly pointed out in *Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994);

[T]here may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone. It would risk straining the public's ability to believe – not to mention the plaintiff's – that the courts are neutral arbiters of disputes whose procedures are designed to produce justice out of the clash of adversarial arguments.

13. The recently uncovered-by-happstance Toner e-mail falls squarely within the Sixth Circuit's holding in *Jones* and supports Plaintiff's motion for leave to conduct discovery in this matter.

For these reasons, Plaintiff respectfully requests that this Honorable Court grant his Motion for Leave to Conduct Discovery.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

/s/ Michael R. Dezsi

MICHAEL R. DEZSI (P64530)

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Dated: April 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

s/ Michael R. Dezsi

MICHAEL R. DEZSI (P64530)

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Dated: April 3, 2009

Exhibit A

FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX

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MICHAEL R. DEZSI

March 24, 2009

James D. Todd, Jr., Esq.
U. S. Department of Justice
Civil Division - Federal Programs Branch
20 Massachusetts Avenue N. W.
Washington, D. C. 20530

RE: Fieger v. Federal Election Commission
Case No: 2:08-cv-14125

Dear Jim:

I hope this letter finds you well. I am writing to request that your client, the Federal Election Commission, comply with our request under the Freedom of Information Act dated July 3, 2008, in which we sought documents, including e-mails, sent between Commission agents, including Mr. Toner, and the White House. As I explained in Plaintiff's Supplemental Brief and Exhibit in Support of Motion for Leave to Conduct Discovery, it has come to my attention that the Commission's response to our FOIA request was untrue, inaccurate, or both.

Specifically, I am aware that the Commission has in its possession e-mails sent from Mr. Toner to White House Deputy Assistant Sara Taylor and General Counsel to the Republican National Convention about the enforcement of the Federal Election Campaign Act. The existence of these e-mails squarely contradicts the Commission's assertion that no such documents exist. Having discovered these e-mails only by accident, it leaves me to wonder what else has been illegally withheld under the Freedom of Information Act.

I kindly request that the Commission provide forthwith such e-mails, including any others in its possession, that are responsive to our FOIA request. If the Commission continues to deny the existence of such documents, I intend to explore fully my options for sanctions including those available under Rule 11 or any other applicable rules governing civil procedure and/or any other ethical rules and cannons governing our conduct as officers of the court(s).

FIEGER, FIEGER, KENNEY, JOHNSON & GIROUX

James D. Todd, Jr., Esq.
U. S. Department of Justice
Civil Division - Federal Programs Branch
March 24, 2009
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Thank you kindly for your attention to this matter, and please do not hesitate to contact me if you have any questions.

Very truly yours,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, P.C.

A handwritten signature in black ink, appearing to read "Michael R. Dezsi", written over a horizontal line.

Michael R. Dezsi

MRD/vgb

cc: Greg J. Mueller, Esq.